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Supreme Court of the United States

October Term—1962

No. 35

EDWARD YELLIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* ON REARGUMENT

OSMOND K. FRAENKEL,
120 Broadway,
New York 5, N. Y.
Attorney for American Civil Liberties Union, Amicus Curiae.

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Interest of Amicus

This brief is being submitted with the consent of counsel for both sides filed with the Clerk of this Court.

The American Civil Liberties Union is a national non-profit organization devoted to the implementation of the rights guaranteed by the United States Constitution. It is especially concerned with governmental action which in any way restricts freedom of expression or association.

Argument

This case presents another instance of a conviction for contempt for refusal to answer questions put by a Congressional Committee relating to Communist affiliations. We are concerned only with the issue of the scope of the First Amendment in such inquiries and wish to press upon the Court the desirability of overruling its decisions in *Barenblatt* v. *United States*, 360 U. S. 109; *Wilkinson* v. *United States*, 365 U. S. 399, and *Braden* v. *United States*, 365 U. S. 431.

In those cases the majority of the Court rejected contentions based on the First Amendment on the ground that there was involved "a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown". (360 U. S. at 126); that it was "the nature of the Communist activity involved * * * that establishes the Government's overbalancing interest" (365 U. S. at 414).

We respectfully submit that the underlying concept of a "balance" of interests is fallacious, partly because there is no room in the First Amendment for such balancing, partly because even if balancing were appropriate the scales are unduly weighted if one considers the issue to be one of public versus private interest.

We recognize, of course, that those views have been rejected by the Court though eloquently addressed by its own members in dissent (see particularly Mr. Justice Black, 360 U. S. 142-145). But just as this Court has, from time to time, overruled earlier decisions upon later reconsideration (see, notably, *Minersville School Dist.* v. *Gobitis*, 310 U. S. 586, overruled by *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U. S. 624; and *Wolf* v. *Colorado*, 338 U. S. 25, overruled by *Mapp* v. *Ohio*, 367 U. S. 643), so we submit that it should now reconsider *Barenblatt* and cases resting on it and overrule them.

1. At the outset we wish to make it clear that the position we are urging upon the Court involves no dogmatic assertion of absolutes. Situations can be envisioned in which unrestricted freedom of expression might result in the denial of another basic right guaranteed by the Constitution, such as the right to a fair trial. (See *e.g.* the considerations mentioned by Mr. Justice Frankfurter in *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912, at 919, 920, and *cf. Bridges* v. *California*, 314 U. S. 242; *Pennekamp* v. *Florida*, 328 U. S. 331, and *Craig* v. *Harney*, 331 U. S. 367).

2. While the distinction may appear a semantic one, the proper approach, as developed at length by Frantz in The First Amendment in the Balance, 71 Yale Law Journal 1424-50, is not one of "balancing," but one of definition. In other words, the basic question posed in the context of the case at bar is whether the First Amendment protects a person's right to be silent with regard to certain kinds of affiliations and, if so, then to what extent. In defining the extent of such protection the courts must, of course, consider the consequences of any rule. And, as Mr. Frantz points out in briefly mentioning this problem (*op. cit.* at 1434), that process can be described as "balancing." But he persuasively demonstrates the dangers that lie in such approach.

3. In any case, regardless of the language used to describe the judicial process involved, it is a fundamental error to suppose that what is involved is a consideration of private versus public interests. Merely posing the problem in such terms almost produces the answer. The First Amendment does not exist to protect private interests, but to enshrine the most basic element of a democracy, namely, the importance to the community of the fullest and freest discussion of public issues, discussion which, of course, is impossible without free association, even, as this Court recognized in *Talley* v. *California*, 362 U. S. 60, without a measure of anonymity. Indeed, the majority of the Court there in effect rejected the "private v. public" interest consideration which was relied on by the dissenting justices (362 U. S. at 69).

* * *

In the light of the foregoing, there are various questions which should be considered by the Court:

1. Is the right to remain silent about affiliations, political, religious, or otherwise, protected by the First Amendment at all? That the answer must be affirmative cannot be doubted in the light of this Court's various decisions. (See particularly *Bates* v. *Little Rock*, 361 U. S. 516, at 523.)

2. Is that right protected against inquiry by all governmental agents, and if not, against which? Here there is, we submit, reason for consideration of the objectives of such agencies. For instance, an answer can be compelled in a law suit where it is deemed relevant to an issue which must be decided to the detriment of one of the parties. For there the public interest in the fair administration of justice is superior to the public interest in free association and the accompanying right not to disclose, leaving the witness to such protection as the privilege against self-incrimination might give in an appropriate case.

Can, however, it be said that the public interest in all inquiries by legislative committees is so great as to outweigh its interest in free association? Surely not, as this Court's decisions in *National Association for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449; *Bates* v. *Little Rock*, 361 U. S. 516; *Louisiana* v. *NAACP*, 366 U. S. 293, and *NAACP* v. *Gallion*, 368 U. S. 16, make clear.

To draw the line the Court has attempted various formulations, no one of which appears to have secured the approval of all its members. Perhaps that made by Mr. Justice Stewart in the *Bates* case, *supra*, at page 524, has met with the widest approval. It certainly has the advantage over the formulation in *Barenblatt* which weighed private against public interests. Paraphrasing what Mr. Justice Stewart said there, the problem here is whether the Committee on Un-American Activities of the House of Representatives has "demonstrated so cogent an interest" in obtaining answers to the questions put "as to justify the substantial abridgement of associational freedom which such disclosures will effect."

To such a question it is not a sufficient answer to point to the dangers of the Communist conspiracy as was done in *Barenblatt* (360 U. S. at 127-128). To recognize that these dangers justify the creation of a committee to gather facts to assist the Congress in legislating is a far cry from ac-

cepting them as sufficient to require disclosure of affiliations from unwilling witnesses. For it should ever be borne in mind that the only proper objective of such a committee is to recommend legislation, not to establish the facts with regard to a particular individual or occurrence. Of course some facts must be established before legislation can rationally be proposed. But, unlike a law suit, not all the relevant facts need be developed.

We suggest, therefore, that the courts, in considering the right of any investigating committee substantially to abridge associational freedom, should consider the cogency of the need for the particular answers requested, not the importance of the general subject under investigation. This, perhaps, is another way of putting the objections voiced to the insistence on answers in particular instances as being motivated by the desire for exposure. (See, *e.g.*, Mr. Justice Brennan, dissenting in *Barenblatt*, 360 U. S. at 166, and in *Wilkinson*, 365 U. S. at 429.) Our suggestion avoids the ascription of "motives" which the majority in *Barenblatt* ruled to be beyond judicial scrutiny (360 U. S. at 132, 133).

For what a court will do if our suggestion is deemed acceptable would be to study the record, not only with regard to the particular witness, but the entire record relating to the background, to see what information the Committee had obtained and was generally available. Ordinarily enough information for legislative purposes is gathered from willing witnesses. That certainly has been the case with the House Un-American Activities Committee. Only if a study of the whole record shows a "cogent interest" in obtaining answers to the particular questions put to the recalcitrant witness should answer be compelled—or punishment inflicted.

* * *

So we come to the record here. Counsel for petitioner attempted, at his trial, to establish that the Committee, when it questioned him, already had so much relevant in-

formation that its interest in answers to the questions put was trivial. The Court of Appeals appeared not to recognize the issue which had been presented. (See 287 F. 2d 292, at 298.)

The government, while claiming that the judicial function is "exhausted" when it has assessed the importance of the subject matter (Brief of the United States on Reargument, p. 60), in effect admitted that the Committee had full information (*id.* p. 61), but urged the importance of corroboration—as though the inquiry were a trial at which conclusions of fact had to be drawn!

The government's further contention (*id.* p. 62) that the inquiry was necessary because the Committee knew nothing about the activities of the Communist Party in Indiana is also beside the point. Indeed, the claim is disingenuous in the light of the many pronouncements about the Communist Party which have emanated from Congress. For the issue is not, as the government would have it, whether petitioner could offer material for "new investigation," but whether there was "cogent" need for it in view of what was already known. And of that there was no evidence whatever.

CONCLUSION

We urge that *Barenblatt, Wilkinson,* and *Braden* be overruled and petitioner's conviction reversed.

Respectfully submitted,

OSMOND K. FRAENKEL,
120 Broadway,
New York 5, N. Y.,
Attorney for American Civil Liberties Union, Amicus Curiae.